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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHEYENNE B., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

NICHOLAS B.,

Defendant and Appellant.

D049439

(Super. Ct. No. EJ2392)

APPEAL from an order of the Superior Court of San Diego County, Gary M.

Bubis, Judge, Referee. Affirmed.

Nicholas B. appeals a juvenile court order summarily denying his Welfare and Institutions Code section 388¹ petition seeking reinstatement of supervised visits with his minor daughter, Cheyenne B.² We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Cheyenne B. was born in September 2000 to Nicholas B. and Ann B.³ In January 2004 the San Diego County Health and Human Services Agency (Agency) detained Cheyenne after Ann hit her with a brush, bruising her lower back and buttocks. The Agency filed a petition under section 300, subdivisions (a) and (b), alleging Cheyenne had suffered serious physical harm as a result of Ann's inappropriate physical discipline, and Cheyenne was at risk of serious physical harm from ongoing domestic violence in the home and Nicholas and Ann's chronic methamphetamine use. The court sustained the allegations of physical abuse under section 300, subdivisions (a) and (b). The court ordered Nicholas to comply with his case plan, which included a domestic violence treatment program, general counseling, parenting education, and substance abuse treatment and testing through the Substance Abuse Recovery Management System program (SARMS).

In March 2004 an allegation of sexual abuse arose concerning Cheyenne and Nicholas. During play therapy session, three-year-old Cheyenne demonstrated oral copulation on a male doll. She told the therapist she sucked her father's penis and

¹ All statutory references are to the Welfare and Institutions Code.

² Minor's counsel claims the issue of whether Nicholas should have visits with Cheyenne is not ripe for adjudication because Nicholas was in jail at the time of the hearing and would not be able to visit Cheyenne. Because Nicholas could have visitation with Cheyenne in the form of letters or telephone contact, the issue was properly addressed by the trial court.

described ejaculation. During the next several months, Cheyenne continued to act out sexually in public, had extreme temper tantrums, and exhibited aggression toward other children and animals. She continued to assert Nicholas had molested her. Nicholas denied he ever molested Cheyenne. Ann, however, described a highly sexualized environment in which Cheyenne was exposed to sexual activity between adults. Nicholas underwent a psychological evaluation conducted by Dr. Thomas Barnes. Dr. Barnes believed Nicholas was drug dependent and needed continued treatment.

Throughout the dependency period, Nicholas made little or no progress with reunification services and drug treatment. By December 2004 he was serving time in prison and had little contact with the social worker. In a March 2005 review report, the social worker reported Nicholas was in custody. The social worker recommended the court approve a modified case plan for Nicholas requiring him to participate in domestic violence and sexual abuse counseling, a psychotropic medication evaluation and substance abuse services, including a 12-step program. The court subsequently reordered Nicholas to participate in SARMS.

After Nicholas was released from prison, he met with the social worker and appeared eager to start participating in reunification services. The social worker provided Nicholas with referrals for services, including individual counseling. By the time of the 18-month review hearing, however, Nicholas had not shown substantive progress with reunification services and the social worker recommended the court terminate services.

3 Ann B. is not a party to this appeal.

The court found Nicholas had not made substantive progress with his case plan and terminated services. The court further found Ann had made substantive progress with services and placed Cheyenne with Ann.

During the next six months, Nicholas had no contact with Cheyenne and his whereabouts were unknown. The social worker recommended Cheyenne remain with Ann and continued the recommendation of no contact between Cheyenne and Nicholas. Cheyenne remained in therapy and was making progress.

In May 2006 the Agency located Nicholas in prison. Nicholas filed a section 388 petition, seeking to have visitation with Cheyenne. Nicholas alleged as changed circumstances that there was no evidence he had ever sexually abused Cheyenne and he had appropriate visits with her in 2004. He requested visits be held at a visitation center after he was released from prison. He further requested that the court allow him to communicate with Cheyenne by letters and audio tapes. Nicholas alleged that he and Cheyenne had a loving, trusting relationship and it was in Cheyenne's best interests to continue contact with him.

The court heard the matter in July 2006. Nicholas remained in prison and waived his right to appear at the hearing. After considering Nicholas's assertions, the court summarily denied the section 388 petition. Nicholas timely filed a notice of appeal.

DISCUSSION

I

Nicholas contends in his opening brief that the court erred by summarily denying his section 388 petition. He asserts he made a prima facie showing that circumstances had changed and the proposed modification was in Cheyenne's best interests because she had made significant progress with therapy and was now prepared to work on her relationship with him.

A

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Marilyn H.*, at p. 310.) " '[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415; see also *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) "However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would

promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

B

The Agency argues Nicholas has forfeited the argument raised in his opening brief on appeal. "[A] parent's failure to object or raise certain issues in the juvenile court prevents the parent from presenting the issue to the appellate court. [Citations.]" (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) Nicholas asserts Cheyenne had made significant progress with therapy and, as a result, she was prepared to have a relationship with him. However, Nicholas did not raise this assertion before the trial court and thus has forfeited the argument on appeal.

Even had Nicholas raised this argument in the trial court, he still did not make a prima facie showing of a change in circumstances. Cheyenne had made progress in therapy but this did not mean she was prepared to see Nicholas, and Nicholas presented no evidence showing he had made progress with the problems leading to the dependency. He had not successfully completed a domestic violence program, a drug program, or individual counseling. Admittedly, Nicholas was incarcerated at various times during the dependency. When he was out of prison, however, he did not make a strong effort to pursue services and the record does not show he made progress with services by attending programs in jail. In addition, Nicholas did not address the allegations of sexual

abuse and remained in denial that he had ever molested Cheyenne. The absence of any showing of a change in circumstances did not require the court to hold a hearing on Nicholas's section 388 petition. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 465.)

Even had Nicholas shown changed circumstances, he did not show it was in Cheyenne's best interests to resume visitation with him. Although Nicholas visited with Cheyenne early in the dependency proceedings, the evidence showed their relationship was not beneficial to Cheyenne. She repeatedly told her therapist about being sexually abused by Nicholas and about seeing Nicholas abuse Ann. Nicholas did not participate in services during the reunification period and made no showing he was able or ready to have visits with Cheyenne. Cheyenne needed to feel safe and secure at this point in the dependency. She had made progress in therapy and was doing well in Ann's care. Because the facts alleged would not have sustained a favorable decision on the section 388 petition, Nicholas was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.